On the question of maintenance, I accepted the allegation of the respondent that he was unemployed (except for a period of three months from April to June, 1982), since February, 1981. The evidence was plausible enough; his desperation and legal proceedings to get his passport, ill-conceived proceedings apparently, for going to Sabah where he was confident of getting a job, his selling the only known valuable asset, viz. the matrimonial home. The petitioner on the other hand, had been earning some income, one way or another, and up to the hearing of this application, had been and is believed still to be earning $300/- to $400/- per month. I considered also that even an unemployed husband could be legally ordered to pay a nominal sum, for his spouse or ex-spouse, and his children. Further, after paying $60,000/- to the petitioner out of the proceeds of sale, there would be still a very handsome sum in the hands of the respondent and there was no time like now to utilize part of the said sum to pay for past maintenance and for same in advance. I also considered that the job in Sabah could possibly fetch some good income but as to how much, the Court would decline to be a fortune teller and would leave it to the petitioner to apply for increase in maintenance if circumstances later justify it. I also was of the view that since the respondent had already incurred money for maintaining his two minor children between January, 1981 and the date of hearing of the application, an order for past maintenance should be in her favour. I took into account the responsibility on the part of the respondent for the breakdown of the marriage, in connection with the co-respondent, but I could not ignore the respective needs and means of both the petitioner and respondent. Considering all the circumstances, I made an order for payment of a smaller sum of $200/- per month for past maintenance in favour of petitioner. Because of the prospect of a good job in Sabah, and because of the cash now happening to be available, I made an order for maintenance at a total sum of $600/- per month, payable in equal shares to or for the petitioner and her two minor children to be payable in advance for the period of six months from December 1, 1982, all the sums to be paid out of the balance sum that would be left in the hands of the respondent. After the petitioner had taken the sum of $60,000/-, I bore in mind, that should his income in Sabah prove to be substantial, application could be made for variation of the present order for maintenance of $600/-. It was not considered necessary to incorporate this right of variation in the orders the Court made and they included the order that the respondent, his servants or agents be restrained from dealing in any way with the said balance sum of $150,000/- until the payment of the said sum of $60,000/- the past maintenance and maintenance for six months in advance aforesaid.

In the event of a cross-appeal, I think I ought to deal with the order for past maintenance, i.e. from January, 1981 to date of hearing of the present application. Under section 77 (1) of the Law Reform (Marriage and Divorce) Act, 1976, it is provided that maintenance can be ordered, (a) during the course of any matrimonial proceedings, (b) when granting or subsequent to the granting of a decree of divorce or judicial separation and (c) when a wife or former wife is found to be alive after a decree presuming her to be dead. In this connection, application for maintenance was made expressly under this Act. The wording of this section 77 (1) may appear to suggest that an application for maintenance could only be made for maintenance payable or commencing as from the date of application within any of the three periods aforesaid, but in my view, the Court would not be precluded in the absence of an express provision to that effect, from making any order for past maintenance by virtue of Married Women and Children (Maintenance) Act, 1950, from an antecedent date of neglect or refusal to maintain.

Order accordingly.

Solicitors: *C.H. Liew & Co.; Chong Thian Fook & Partners.*

TAN POEY KHENG v. MA PENG KIAT

[O.C.J. (Mohamed Dzaiddin J.) February 21, 1983]
[Kuala Lumpur – Originating Summons No. 983 of 1982]

Practice & Procedure – Ex parte application – Principles to be applied – R.H.C. 1980, O. 32 r. 6.

Family Law – Custody of children – Ex parte application – Principles to be applied.

This was an application by the respondent to set aside the Order of Court made *ex parte* on November 19, 1982 granting the applicant interim custody of the 2 infant children until the final disposal of the main case. The respondent was dissatisfied with this *ex parte* application and contended that it should have been made *inter partes* and that he be given the right of being heard.

Order 32 rule 6 of the Rules of the High Court 1980 provides that the court may set aside an order made *ex parte*.

Held, allowing the respondent's application: there was no "emergency created when the interest of justice or the protection of the child clearly demands the immediate intervention by the court". From the facts and circumstances surrounding the case, the applicant ought to have filed the application *inter partes* so that the respondent could have been given the opportunity of being heard on the disputed issue.

Cases referred to:

(1) *Boyle* v. *Sacker* (1888) 39 Ch.D. 249, 251.
(2) *The Hagen* [1908] P. 189, 201.
(3) *Lazard Brothers & Co* v. *Midland Bank* [1933] A.C. 289, 307.
(4) *Craig* v. *Kanseen* [1943] 1 All E.R. 108, 113.
(5) *Ansah* v. *Ansah* [1977] 2 All E.R. 638.

ORIGINATING SUMMONS.

C.H. Liew (Miss) for the applicant.

K. Anantham (*Miss A. Sreenevasam* with him) for the respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This is an application by the respondent to set aside the Order of this Court made *ex parte* on November 19, 1982 granting the applicant interim custody of the two infant children until the final disposal of the main case. The respondent is dissatisfied with this *ex parte* application and contends that it should have been made *inter partes* and that he be given the right of being heard.

Order 32 Rule 6 of the Rules of the High Court 1980 provides that the Court may set aside an order made *ex parte*. This rule embodies the fundamental rule of practice that a party affected by an *ex parte* order may apply to the Court to discharge it, inasmuch as he has not had an opportunity of being heard – see *Boyle* v. *Sacker*(1) at page 251 per Cotton L.J. In addition to this rule, the Court has also an inherent jurisdiction to revoke leave given *ex parte*. As an example, see the *Supreme Court Practice*, 1979 Edition, Volume I, page 520 under Order 32/1 – 6/11.

There are a number of well settled principles regarding *ex parte* applications, one of which is that when applying for an *ex parte* order, it is the duty of the applicant to make a full and fair disclosure to the Court of all the relevant facts of which he knows; and failure to do so may itself be a ground for setting aside such an order – see *The Hagen*(2); *Lazard Brothers & Co.* v. *Midland Bank*.(3)

It is said in *Craig* v. *Kanseen*(4) at page 113 that orders made *ex parte* are anomalies in our (English) system of justice which generally demands service or notice of the proposed proceedings on the opposite party.

In *Ansah* v. *Ansah*(5), a Court of Appeal case on an *ex parte* injunction in matrimonial proceedings, Ormrod L.J. reading the judgment of the Court said at page 642 as follows:

> "Nonetheless, the power of the court to intervene immediately and without notice in proper cases is essential to the administration of justice. But this power must be used with great caution and only in circumstances in which it is really necessary to act immediately. Such circumstances do undoubtedly tend to occur more frequently in family disputes than in other types of litigation because the parties are often still in close contact with one another and, particularly when a marriage is breaking up, in a state of high emotional tension; but even *in such cases the court should only act ex parte in an emergency when the interests of justice or the protection of the applicant or a child clearly demands immediate intervention by the court.* Such cases should be extremely rare, since any urgent application can be heard inter partes on two days' notice to the other side (see *Rayden* on Divorce). *Circumstances, of course, may arise when prior notice cannot be given to the other side;* for example, cases where one parent has disappeared with the children, or a spouse, usually the wife, is so frightened of the other spouse that some protection must be provided against a violent response to service of proceedings, but the court must be fully satisfied that such protection is necessary."
> (The emphasis is mine).

Let us now consider the facts so far as they are relevant to this application. The parties were married on July 23, 1972 at Kuala Trengganu. They have two children born on July 2, 1976 and February 9, 1979 respectively. Due to serious matrimonial difficulties, the parties agreed to live separately. The respondent left the matrimonial home of No. 42, SS 21/9, Petaling Jaya, on or about May 1, 1982 leaving the applicant and the two children. The husband, however, had free access to the children and had in fact visited them freely and frequently until something happened on September 28, 1982. The applicant alleged that on this material date the respondent after visiting the children requested to take the younger son for the night. She consented to her husband's request, but the child was not returned as promised. During this period, she was busy moving house and only started looking for the child on October 5, 1982. The applicant consulted her solicitors, who wrote to the respondent's solicitors on October 29, 1982 intimating of her desire to have custody of the two children. It was also alleged that the husband was hiding the younger child. On November 9, 1982, the respondent's solicitors replied denying

the allegation. Then, on November 13, through her new solicitors, the applicant filed an Originating Summons asking for custody of the two children, an injunction against the respondent and for maintenance. On the same day, the applicant also applied *ex parte* for interim custody of the two children and an injunction against the respondent from removing the children from her custody without her consent until further order. This *ex parte* application was heard, and an order was granted on November 19, 1982. On January 5, 1983, the wife applied to commit the husband for breach of the Order of November 19, 1982. At the same time, the respondent applied to set aside this Order.

Applying the principles of *Ansah's case* to the facts herein mentioned, I am of the view that there is no "emergency created when the interest of justice or the protection of the child clearly demands the immediate intervention by the court". The main ground that could have possibly influenced the Court to grant the interim custody appears in paragraph 5 of applicant's affidavit dated November 13 1982, where it is alleged that the respondent had tricked the applicant by asking for the child to be with him for one night. However, notwithstanding this allegation, in my opinion, this is not a ground for an *ex parte* application.

On the question of urgency, I find as a fact from the sequence of events from September 28, 1982 until the application was filed on November 13, 1982 that there was no urgency in the matter to demand immediate intervention by the Court.

Again, from the correspondences and negotiation between solicitors, prior notice of the intended application could easily be given and thus could have avoided this application to be made *ex parte.*

From the facts and circumstances surrounding this case, the applicant ought to have filed the application *inter partes* so that the respondent could have been given the opportunity of being heard on the disputed issue.

I allow this application by setting aside the Order of November 19, 1982.

Costs will be costs in the cause.

Application allowed.

Solicitors: *Wan Abdul Majid C.H. Liew & Sulaiman Alias; Skrine & Co.*

SEK KON KIM v. ATTORNEY-GENERAL

[O.Cr.J. (Mohamed Dzaiddin J.) March 23, 1983]

[Kuala Lumpur – Federal Territory Criminal Application No. 3 of 1983]

Criminal Law & Procedure – Bail – Extradition proceedings against applicant for alleged criminal breach of trust in Australia – Court's unfettered discretion to grant bail – Extradition Ordinance 1958 – Fugitive Criminals Act 1967, s. 23 – Criminal Procedure Code, s. 388(i)

Extradition – Extradition proceedings for alleged criminal breach of trust in Australia – Extradition Ordinance 1958 – Fugitive Criminals Act 1967, s. 23.

Bail – Extradition proceedings against applicant for alleged criminal breach of trust in Australia – Court's unfettered discretion to grant bail – Factors considered by court – Extradition Ordinance 1958 – Fugitive Criminals Act 1967, s. 23 – Criminal Procedure Code, s. 388(i).

The applicant, a Malaysia, was a practising barrister and solicitor in Australia until late October 1982 when he returned to Malaysia without winding up his affairs in his legal practice. In December 1979 the Australian authorities started extradition proceedings against him for alleged criminal breach of trust. He was alleged to have committed offences in Australia which related to fraudulent conversion of cheques totalling A$104,646.78. On March 17, 1983 he was arrested on a warrant of apprehension issued by a Magistrate pursuant to an order signed by the Minister of Home Affairs, Malaysia under section 2 of the Extradition Ordinance 1958. The applicant was produced the same afternoon before a Magistrate who fixed the hearing of the extradition proceedings on April 7, 1983. In the meantime, he was remanded in custody. Counsel for the applicant applied for his release on bail pending the hearing on April 7, 1983. The application was refused by the learned Magistrate. The applicant applied to the present court to grant bail.

Held, allowing the application: (1) in so far as the Extradition Ordinance is concerned, the court has unfettered discretion to grant bail under section 388(i) of the Criminal Procedure Code;

(2) having considered the nature and gravity of the offence, the character, means and standing of the applicant, the guarantee given by his counsel that, if need be, he would surrender himself to the Australian Authorities to face the charges, and having weighed the other considerations for and against this application, bail of $100,000 with 2 sureties would be granted. The applicant must also surrender all his travelling documents including his international passport to the court.

CRIMINAL APPLICATION.

Lee Lim Huat for the applicant.

John O'Hara (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.